LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAR 7 1975
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

No. 74-997

DONALD G. FENDER,

Petitioner,

v.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

M. D. SAMPELS
ROBERT A. WOOLDRIDGE
WORSHAM, FORSYTHE & SAMPELS
Twenty-five Hundred, 2001
Bryan Tower,
Dallas, Texas 75201
Attorneys for Respondent.

Of Counsel:
ROY P. COSPER
1517 West Front Street
Tyler, Texas 75701

SOUTHWESTERN LAW PRESS — DALLAS, TEXAS — (214) 742-4257

TABLE OF CONTENTS

	Page
Objection to Jurisdiction	1
Statement of the Case	3
Argument	4
Conclusion	9

Cases **Page**

Adam vs. Saenger, 303 US 59, 58 S. Ct. 454, 82 L. Ed. 649 (1938) 8

Adams vs. State Board of Ins., 319 SW2d 750, 754 (Tex. Civ. App. — Houston, 1958, writ ref'd, n.r.e. 5

Adrickes vs. Kress & Co., 398 US 144, 90 S. Ct. 1958, 26 L. Ed. 2d 142 (1970) 8

Barney vs. Credit Plan Corporation, 403 SW2d 230 (Tex. Civ. App. — San Antonio, 1964, no writ) 6

Burnett vs. New York Central Railroad Company, 380 US 424 (1965) 2

Gardner vs. Martin, 345 SW2d 274 (Tex. 1961) 5

Hanley vs. Donoghue, 116 US 1, 6 S. Ct. 242, 29 L. Ed. 535 (1885) 8

Hedgebeth vs. North Carolina, 334 US 806, 68 S. C. 1185, 92 L. Ed. 1739 (1948) 8

Henry vs. State of Mississippi, 379 US 443, 85 S. Ct. 564, 13 L. Ed. 2nd 408 (1965) 3

Levlon vs. Dallas Ry. & Term. Co., 117 S.W.2d 876, 878 (Tex. Civ. App. — Dallas 1938, writ ref'd) 7

Mutual Life Insurance Company of New York vs. McGrew, 118 US 291, 23 S. Ct. 375, 47 L. Ed. 480 (1903) 7

Nichols vs. Smith, 507 SW 2nd 518 (Tex. 1974) 4

Ohio Bell Telephone Co. vs. Public Utilities Commission of Ohio, 301 US 292, 57 S. Ct. 728, 81 L. Ed. 1093 (1937) 7

Reimer vs. Lee & Bulah Moor Children's Home, 473 SW 2d 349 (Tex. Civ. App. — El Paso, 1971 aff'd 476 SW 2d 665 5

Rohner vs. Union Pacific Railroad Company, 225 F2d 272, 274-275 (CCA-10th Cir., 1955) 4

Page

Schland vs. Schland, 415 SW2d 28 (Tex. Civ. App. — Houston 1967, writ ref'd, n.r.e.) 6

Shapleigh vs. Mier, 299 US 468, 57 S. Ct. 261, 81 L. Ed. 355 (1937) 7

Statutes

Title 28, Section 1257 (3), United States Code 2

Title 45, Section 56, United States Code 4

Rules

Rule 24(2), United States Supreme Court Rules 1

Rule 19(A), United States Supreme Court Rules 2

Rule 184A, Texas Rules of Civil Procedure 6

Rule 371, Texas Rules of Civil Procedure 6

Secondary Authorities

2 McCormick & Ray, Texas Law of Evidence, §1278 at 148 6

32 C.J.S. Evidence 629 (1964) 6

4 Tex. Jur. 2d, Rev., Part 2, Pages 310 to 311 (1974) 6

1 McCormick & Ray, Texas Law of Evidence, §151 at 170 (1956) 7

4A C.J.S. §702 Appeal & Error 530 (1957) 8

5 C.J.S. §1480(c) Appeal & Error 749-750 (1958) 8

In The

Supreme Court of the United States

No. 74-997

DONALD G. FENDER,

Petitioner,

v.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To The Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your respondent, St. Louis Southwestern Railway Company, respectfully files this its Brief in Opposition to the Petition for Writ of Certiorari, for the purpose of presenting to this Court certain matters and grounds showing why this cause should not be reviewed by this Court. Respondent prays that the Petition be in all respects denied.

OBJECTION TO JURISDITION

Respondent respectfully objects to the jurisdiction of this Court to grant Writ of Certiorari herein. Rule 24(2) Sup. Ct. Rules. From a review of the official opinion of the Court of

Civil Appeals, Fifth Supreme Judicial District of Texas, (pages A-8, Appendix to Petitioner's Brief), it is clear that the Texas Courts did not decide any "federal question of substance". Rule 19 (A) Sup. Ct. Rules. Nor was the validity of a statute of the United States drawn in question. Title 28, United States Code, Section 1257 (3).

The question presented by Petitioner in his brief involves whether Texas Courts should have taken judicial notice of certain *factual* matters involved in a suit filed in the State of Illinois. This question was never before, or reached by, the Texas trial court. No evidence of the Illinois proceeding, to which Petitioner refers in his brief, was presented to the trial court and has never been a part of the record herein. No request was made of the trial court that it take judicial notice of such proceeding.

The trial court granted Summary Judgment based upon the uncontradicted proof before it that more than three years had elapsed between the date of Petitioner's alleged injury and the filing of suit. Petitioner had the burden to properly raise a fact issue regarding this affirmative defense. Since other Court proceedings were not before the trial court, the question which Petitioner *now* seeks to present is not properly a subject for consideration, and the trial court's decision, affirmed in all respects by the Texas appellate courts, therefore raises no federal question to be reviewed here. The Judgment of the trial court and the decision of the Texas Court of Civil Appeals do not, as suggested by Petitioner, conflict with ***Burnett v. New York Central Railroad Company***, 380

U.S. 424 (1965). The *Burnett* case did not involve questions of *proof* or authenticity of other judicial proceedings.

The Judgment entered in the trial court was not based on the construction of a federal statute, but rather upon a determination of fact, and the failure of Petitioner to offer any evidence in response to the clear proof of limitations. The Judgment rests on adequate and independent state grounds and this Court should therefore decline to review it. *Henry* vs. *State of Mississippi*, 379 U.S. 443, 85 S. Ct. 564, 13 L. Ed. 2nd 408 (1965).

STATEMENT OF THE CASE

Respondent cannot adopt Petitioner's Statement of the Case because it contains recitations of alleged factual matters that were not before the trial court, the Texas Court of Civil Appeals, or the Texas Supreme Court and are not supported in the record now before this Court. More specifically, Petitioner's recitations concerning the filing of suit in Illinois, the actions of the parties there, the time Petitioner filed suit there and the time of denial of a Petition for Rehearing in Illinois are outside the record in this case.

Petitioner filed his Original Petition in the District Court in Dallas, Texas on October 12, 1971. He pled and testified that his alleged injury occurred on December 7, 1967. More than three years had elapsed between the date of the injury and the filing of this cause. Respondent's Motion for Summary Judgment urged that Petitioner failed to institute this proceeding within the applicable statute of limitations period and

that Petitioner's action was barred by limitation. Petitioner filed no reply to Respondent's Motion and did not ask leave to amend his pleadings. Petitioner filed no counter-affidavits, or documents, and offered no other evidence in rebuttal of Respondent's Motion.[1]

As is clear from the record, no Motion was made by Petitioner to the trial court asking that Court to take judicial notice of any proceeding in another state.

ARGUMENT

The record before the trial court consisted of Petitioner's pleading which clearly revealed that his suit had been filed more than three years after the date of injury. Respondent raised the affirmative defense that the suit was barred by federal statute which requires that Petitioner's cause be commenced within three years from the day the cause of action accrued. Title 45, United States Code, Section 56. As acknowledged by the Texas Court of Civil Appeals in its opinion (Petitioner's Appendix Page A-5), it was incumbent upon Petitioner "to come forward with appropriate Summary-Judgment evidence to show that the affirmative defense of limitations would not apply", (citing *Nichols vs. Smith*, 507 SW 2nd, Tex. 1974 and numerous other Texas cases). In *Rohner* vs. *Union Pacific Railroad Company*, 225 F2d 272

[1]Petitioner refers in his Statement to certain briefs allegedly filed by the parties in the trial court and to an Illinois Court opinion. These matters were not on file or in evidence in the trial court at the time the Court heard Respondent's Motion for Summary Judgment, were not designated by Petitioner for inclusion in the transcript, and were not included in the record of this case on appeal.

(CCA-10th Cir., 1955), an employee, as is the case here, sued under the Federal Employee's Liability Act to recover for an alleged injury, his complaint, as here, disclosing that injury occurred more than three years prior to commencement of the action. The defendant Railroad moved to dismiss and asked for Summary Judgment. There the Court held:

> "The complaint in question disclosed that the asserted cause of action had its inception more than eight years prior to the time the case was filed; and, when Defendant, by motion, admitted all facts well-pleaded, *it then became incumbent upon Plaintiff to demonstrate to the trial court that, although not shown by the present state of the pleadings, a material issue of fact existed. Plaintiff's failure left the fact undisputed,* and the court had no alternative as a matter of law but to render summary judgment for the Defendant . . ." *A complainant under the Federal Employee's Act must allege and prove the action has been instituted within the prescribed time, Carpenter* vs. *Erie Railroad Co., 3 Cir.,* 1954, 132 F2nd 362." (Emphasis added).

Petitioner did not introduce affidavits or certified copies of official records evidencing the existence of any proceeding in another state. He introduced no evidence creating an issue of fact relating to the limitations defense. The Texas Courts consistently have held that in order for a foreign judgment to be considered as part of summary judgment evidence, a *sworn or certified copy* of said judgment would necessarily have to be in evidence and before the court in admissible form. *Gardner vs. Martin,* 345 SW2d 274 (Tex. 1961); *Reimer vs. Bulah Moor Children's Home,* 473 SW2d 349 (Tex. Civ. App. — El Paso, 1971) aff'd 476 SW2d 665; *Adams vs. State Board of Ins.,* 319 SW2d 750, 754 (Tex. Civ. App. — Houston, 1958,

writ ref'd, n.r.e.); 2 McCormick & Ray, *Texas Law of Evidence*, §1278 at 148; 32 *C. J. S. Evidence* 629 (1964).

As acknowledged by the Court of Civil Appeals, there was nothing in the record to indicate that a judgment of the Illinois Supreme Court was ever presented to the trial court and, nothing in the record to indicate that Petitioner requested the trial court to take "judicial notice" of proceedings in another state, as required by the *Texas Rules of Civil Procedure*, Rule 184A. The trial court was "charged with the duty and obligation of considering only the record as it appears before the Court at the time of the hearing". (Court of Civil Appeals opinion, Petitioner's appendix Page A-4, citing numerous cases). The trial court therefore was fully justified in sustaining Respondent's Motion for Summary Judgment.

The Judgment of the trial court was appealed by Petitioner to the Court of Civil Appeals sitting in Dallas. In Texas, the record on appeal consists only of the transcript when, as here, a statement of facts is not necessary. Rule 371, *Texas Rules of Civil Procedure*. The transcript upon which Petitioner predicates his appeal is completely devoid of pleading, motion or evidence raising an issue as to the limitations defense. Matters not contained in the transcript but shown only by the briefs or oral argument cannot be considered by the Appellate Court. *Barney vs. Credit Plan Corporation*, 403 SW2d 230 (Tex. Civ. App. — San Antonio 1964 no writ); *Schland vs. Schland*, 415 SW2d 28 (Tex. Civ. App. — Houston 1967,writ ref'd, n.r.e.); 4 *Tex. Jur.* 2d, Rev., Part 2, Pages 310 to 311 (1974). The Texas Court of Civil Appeals, although noting that Petitioner *states* that

certain things happened in Illinois and *says* that the case there was dismissed and attaches a xerox *copy* of the Illinois court *opinion* in his *brief,* clearly found that these matters were not a part of the record on appeal and that there was nothing in the record to indicate that these matters were ever presented to the trial court. The briefs to which Petitioner refers on Page 4 of his Petition are likewise not a part of the transcript, were not even attached to Petitioner's brief in the Court of Civil Appeals, and form no part of the record of this case at the present time.

Judicial notice is merely *a way of introducing evidence* without resorting to the ordinary formalities; it does not circumvent the requirements of orderly judicial procedure. *Mutual Life Insurance Company of New York vs. McGrew,* 118 US 291, 23 S.Ct. 375, 47 L. Ed. 480 (1903); *Ohio Bell Telephone Co. vs. Public Utilities Commission of Ohio,* 301 US 292, 57 S.Ct. 728 81 L. Ed. 1093 (1937); *Shapleigh vs. Mier,* 299 US 468, 57 S.Ct. 261, 81 L. Ed. 355 (1937). The theory of judicial notice is that the fact to be noticed is so notorious or its existence so easily ascertainable that proof will not be required. *Levlon vs. Dallas Ry. & Terminal Co.,* 117 S.W.2d 876 (Tex. Civ. App. — Dallas 1938, writ ref'd); 1 McCormick & Ray, *Texas Law of Evidence,* §151 at 170. The Illinois opinion which Petitioner attached to his brief in unauthenticated form is not relied upon by him to show what the *law* is in Illinois, but rather is a belated effort to prove certain basic *facts.* What may have occurred in another law suit in a foreign state is not so notorious or easily ascertainable that no proof would be required and Texas procedure properly requires that authenticated copies

of any pertinent records or proceedings must be formally introduced into evidence. *Adams vs. State Board of Insurance, supra.* At the very least, it would be incumbent upon Petitioner to *request* the trial court to recognize the Illinois case before being permitted to complain now of its failure to do so. In *Mutual Life Insurance Company of New York vs. McGrew, supra,* this honorable Court clearly acknowledged that judicial knowledge cannot be used to *later* supply proof of matters not contained in the record on appeal.

In exercising its appellate jurisdiction over cases appealed from State Courts, this Court has heretofore determined that it will not take judicial notice of matters that the Court from which the appeal is taken will not judicially notice. *Hanley vs. Donoghue,* 116 US 1, 6 S. Ct. 242, 29 L. Ed. 535 (1885); *Adam vs. Saenger,* 303 US 59, 58 S. Ct. 454, 82 L. Ed 649 (1938). This Court can only consider facts which were properly presented to the trial court and made a part of the record on appeal. *Hedgebeth vs. North Carolina,* 334 US 806, 68 S.C. 1185, 92 L. Ed. 1739 (1948); *Adrickes vs. Kress & Co.,* 398 US 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970); 4A *C.J.S.* §702 *Appeal & Error* 530 (1957); 5 *C.J.S.* §1480(c) *Appeal & Error* 749-750 (1958).

CONCLUSION

Petitioner's brief is based in its entirety upon matters which were not in evidence before the trial court and not a part of the record on appeal. Viewed from the standpoint of the District Judge in the trial court with the uncontradicted evidence before him, it is clear that his judgment was a sound and correct one. Petitioner did not ask the Court to take judicial notice of a foreign proceeding, did not request permission to reopen the hearing to present evidence, and did not take any other action to present the foreign proceedings to the Court as orderly procedure require. Such is also the case with the Texas Court of Civil Appeals in their consideration of the record before it, properly disregarding unauthenticated claims made outside of the record and not in evidence before the trial court whose decision it was reviewing. No federal question has been presented. Not a single authority has been cited to support Petitioner's claims relating to the question of judicial notice. The Courts that heard and opined in *Burnett, supra,* certainly had before them no such *evidentiary* issues. The applicable Texas law is clear and undisputed as is its binding effect as the law of the case.

Finally, Petitioner appeals that his cause should not be "thwarted." The requirements of orderly judicial procedure worked no hardship upon Petitioner in this case. He complains now of the failure to grant a motion which was never made. Nothing that either Respondent or the Texas Courts did de-

prived him of any federal right. Respondent therefore prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

M.D. SAMPELS
ROBERT A. WOOLDRIDGE
WORSHAM, FORSYTHE & SAMPELS
Twenty-five Hundred, 2001
Bryan Tower,
Dallas, Texas 75201

By .....
Robert A. Wooldridge

Attorneys for Respondent,
St. Louis Southwestern Railway Company

Of Counsel:
ROY P. COSPER
1517 West Front Street
Tyler, Texas 75701